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IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pa. Dept. of Corrections; CONNER BLAINE, JR., Supt. of the State Correctional Institution at Greene; and JOSEPH P. MAZURKIEWICZ, Supt. of the State Correctional Institution at Rockview,
Petitioners

v.

HENRY FAHY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a capital habeas petitioner entitled to equitable tolling of the federal habeas corpus filing deadline — where, under identical circumstances, a non-capital petitioner would not receive tolling — on the ground that "death is different?"

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

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ORDERS AND OPINIONS BELOW

The March 27, 2001, order of the United States Court of Appeals for the Third Circuit, denying petitioners' petition for rehearing, is reproduced at App. 1-2. The February 9, 2001, judgment and opinion of the court of appeals, affirming the order of the district court granting respondent a stay of execution, is reported at 240 F.3d 239 (3d Cir. 2001), and is reproduced at App. 3-15. The October 14, 1999 order of the United States District Court for the Eastern District of Pennsylvania, granting respondent a stay of execution, is reproduced at App. 16-25. The October 14, 1999 order of the district court, directing the assignment of a new civil action number, is reproduced at App. 26. The November 18, 1999, order of the district court, denying reconsideration of the grant of a stay, is reproduced at App. 27-28.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding initiated, more than a year past the statutory filing deadline, by a state capital defendant. The district court ruled that the deadline would be tolled, and granted a stay of execution. The state appealed to the court of appeals, which affirmed the order of the district court. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §2244(d), which provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
>
> or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

The opinion below marks the twentieth anniversary of the crime. In January 1981, respondent raped and then murdered a twelve-year-old girl after a day of torture in her home. Respondent was tried before a jury, which convicted him of first degree murder and sentenced him to death in 1983. The judgment of sentence was affirmed on direct appeal in 1986.

Respondent then litigated a series of state post-conviction petitions. In 1995, during proceedings on the third such petition, respondent notified the trial judge that he wished to waive all further review and proceed to execution of sentence. After a lengthy colloquy held over two days a week apart, the court determined that respondent's waiver was voluntary and valid. Counsel appealed this decision, but the state supreme court upheld the waiver in 1997.

While that appeal was pending, both the state and federal governments enacted deadlines for the filing of post-conviction petitions. The new state statute facially precluded any future post-conviction petitions in respondent's case, since he had already conducted earlier rounds of such litigation. The new federal statute, however, permitted respondent one year from the conclusion of his pending state litigation – until September 1998 – to file a federal habeas corpus petition.

Nevertheless, upon the conclusion of his 1997 appeal, respondent filed yet another state post-conviction petition, but no federal habeas petition. The state petition was promptly dismissed as untimely. Respondent appealed, lost, filed a reargument petition, lost, and only then, in October

1999 – six days before his scheduled execution and one year after the apparent federal deadline – came to federal court.

The district court granted a stay of execution, ruling that the state courts had incorrectly interpreted state law on the timeliness of respondent's state post-conviction petition, and that respondent was therefore entitled to statutory tolling under 28 U.S.C. §2244(d)(2) ("properly filed" state post-conviction petition tolls time for filing federal habeas corpus petition). For good measure, the district court ruled in the alternative that respondent was entitled to equitable tolling of the federal deadline. The court reasoned that, because the state's post-conviction filing deadline was relatively new, respondent could not have been certain it would really be applied against him, and so he was justified in taking a chance on delaying his federal petition.

The court of appeals rejected the district court's statutory tolling rationale.[1] The appellate court further held that, whatever uncertainty might have existed about state law and its effect on federal habeas corpus review, such legal miscalculations do not qualify for equitable tolling — not "[i]n non-capital cases," that is. App. 12. However, the court then observed, "death is different.... In a capital case such as this,

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[1] The court relied on *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (state post-conviction petitions are not "properly filed" for purposes of tolling under 28 U.S.C. §2244(d)(2) unless they are "submitted according to the state's procedural requirements, such as the rules governing the time and place for filing"), which, in turn, this Court cited favorably in *Artuz v. Bennett*, 121 S. Ct. 361, 364 (2000) ("an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. See, e.g., ... *Lovasz v. Vaughn*").

the consequences of error are terminal.... Here the penalty is death." App. 13. In that context, neutral rules do not apply. Accordingly, the court held that the federal habeas filing deadline must be equitably delayed to give capital defendants such as respondent the benefit of uncertainties in the law.

REASONS FOR GRANTING THE WRIT

A CAPITAL HABEAS PETITIONER IS NOT ENTITLED TO EQUITABLE TOLLING OF THE FEDERAL HABEAS CORPUS FILING DEADLINE — WHERE, UNDER IDENTICAL CIRCUMSTANCES, A NON-CAPITAL PETITIONER WOULD NOT RECEIVE TOLLING — ON THE GROUND THAT "DEATH IS DIFFERENT."

This is a case in which respondent, a state capital defendant, delayed the filing of his federal habeas corpus petition for over a year past the expiration of the filing deadline established in 28 U.S.C. §2244. Once finally in federal court, he argued that his delay should not count against him, because during that time he had chosen instead to pursue a state post-conviction petition – a petition that was facially untimely under state law, and that was dismissed in due course on that ground by the state courts.

The court of appeals correctly held that, because the state petition was untimely, it was not "properly filed" and therefore did not toll the federal deadline under 28 U.S.C. §2244(d)(2). The court also held that, under the circumstances presented, the statute was not subject to equitable tolling — at least not for a non-capital defendant.

Invoking the truism that "death is different," however, the court of appeals announced the creation of a special capital tolling rule that would be unavailable to other litigants. The court determined that respondent was entitled to equitable tolling here because, at the time he filed his fourth state post-conviction petition, there was "uncertainty" as to how it would be treated under state law.

As a result, the circuit court concluded, when respondent decided to spend additional years litigating in state court, he did not know for a fact that his state post-conviction petition would be dismissed as untimely, and that it therefore would not toll the federal filing deadline. While a non-capital defendant could not take advantage of such uncertainty, held the court of appeals, a capital sentence vel non requires a different rule of law when necessary to overcome barriers to relief.

The Third Circuit's rationale is in conflict with this Court's precedent. Although death is *sometimes* different as a matter of law, it is not *always* different as a matter of law. Capital murderers do not somehow merit a blanket grant of immunity from normally applicable rules of litigation. The Court has made explicitly clear that capital review departs only in limited circumstances from the process due all criminal defendants. *E.g.*, *Herrera v. Collins*, 506 U.S. 390, 404-05, 113 S. Ct. 853, 862-63 (1993) (specifically rejecting death-is-different argument in holding that actual innocence claims are not independent grounds for relief under federal constitution); *Spaziano v. Florida*, 468 U.S. 447, 459-60, 104 S. Ct. 3154, 3162 (1984) (specifically rejecting death-is-different argument in holding that capital sentences need not be imposed by jury rather than judge).

Indeed, this Court has already explicitly rejected a death-is-different rule even in the context most closely related to the present case: procedural default. *Smith v. Sawyer*, 477 U.S. 527, 538, 106 S. Ct. 2661, 2668 (1986) ("We reject the suggestion that the principles of Wainwright v. Sykes apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws"). The opinion below is without explanation as to why the procedural bar of default carries no death penalty exception, while — at least in the Third Circuit's view — the procedural bar of untimeliness does. *See, e.g., Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000) (applying normal rule of equitable tolling in capital case; tolling rejected and habeas petition dismissed); *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998) (applying normal rule of equitable tolling in capital case; tolling rejected and stay of execution denied).

As difficult as it is to harmonize the court of appeals' ruling with higher judicial authority, however, the task is even more daunting in relation to Congressional mandate. That is because the question of tolling under the federal habeas statute — and specifically tolling for capital cases under the federal habeas statute — is not an open judicial field. Rather, it is a matter that Congress has already specifically considered and addressed. This we know because the habeas statute in fact establishes special filing and tolling rules for capital cases. But it does so only under Chapter 154, § 2263. As for Chapter 153, however – the enactment at issue here – Congress plainly chose ***not*** to distinguish between capital and non-capital cases. Both are governed by exactly the same filing deadline and tolling provision. What the Third Circuit has done – by proclaiming a capital tolling rule of its own and calling it "equitable" — is a direct intrusion into the legislature's power.

Thus cut loose from the constraints of case law and statute, the Third Circuit's "death is different" axiom is available to change outcomes in every capital case in Pennsylvania, New Jersey, and Delaware, and perhaps beyond. But it does so with corrosive effect on whatever principles of law it may touch. Here, for example, in order to fit the rubric of equitable tolling, the court of appeals was required to equate uncertainty of law with inequity. Unfortunately, that equation undermines the very premise of equitable tolling, and conflicts with federal appellate authority interpreting the doctrine.

As the courts have previously recognized, there is nothing unfair about having to choose among available but not infallible legal strategies. That is the position in which virtually all litigants find themselves; but it in no way prevents them from complying with deadlines. The Seventh Circuit has recently made the point in the habeas context:

> The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest. The deadline simply was missed. That is not grounds for equitable tolling.

United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (upholding dismissal of §2255 petition filed one day after deadline); *accord Smaldone v. Senkowski*, 2000 WL 1134391 at *5 (E.D.N.Y. 2000) (rejecting equitable tolling despite then-unresolved conflict among district courts interpreting new federal filing deadline); *see also Reed v. Mokena School District No. 159*, 41 F.3d 1153, 1155 (7th Cir. 1994) ("The unsettled state of the law, standing alone, is not sufficient to trigger the invocation of equitable principles"). It is the rare case that lacks debatable legal issues. That is why

we have lawyers. The fact that sometimes those uncertain issues affect statutes of limitation does not permit the disregard of those statutes in the name of "equity."

Arguments about the uncertainty of respondent's state court proceedings, therefore, miss the point. The court of appeals posited several different theories that might have raised a doubt about whether respondent's untimely state post-conviction petition would really wind up being dismissed. But, however tenable those theories may have been, every argument in favor of respondent's position was met by credible (and ultimately successful) arguments against it.[2] He had no guarantee of success, no vested right to

[2] The court of appeals stated that, when respondent filed his untimely state post-conviction petition in November 1997, he might have believed that the state courts would use Pennsylvania's capital case "relaxed waiver" doctrine to excuse him from the filing deadline.

But relaxed waiver has never been used in relation to the post-conviction filing deadline. When the legislature enacted the filing deadline, in 1995, it added a specific provision to ensure that the filing deadline and other statutory amendments would apply equally to capital and non-capital cases. 42 Pa.C.S.A. §9542. And any hope that the Pennsylvania Supreme Court would ride in to save the day by defying that provision was compromised, if not dashed altogether, when the court chose in August 1997 to incorporate the statutory filing deadlines into its own rules of criminal procedure. Pa. R. Crim. P. 1501(1).

Similarly, the court of appeals observed that respondent might have believed that the state's "government interference" exception, 42 Pa.C.S.A. §9545(b)(1)(i), would excuse his otherwise untimely filing. That also is an articulable argument, although respondent never articulated it. He did not assert the government interference exception, not when he filed his post-conviction

(Continued)

prevail; nor could he or did he claim "surprise" when he failed.[3] From the beginning, respondent faced an obvious,

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(Continued)

petition, not when he responded to the trial court's proposed dismissal of the petition, not when he appealed from the dismissal. He made no mention at all of this exception until his reply brief in the state supreme court. That court understandably held that that was too late. *Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214, 219 (1999); 42 Pa.C.S.A. §9545(b)(1) (exceptions to filing deadline must be alleged in post-conviction petition).

In the same vein, the court of appeals asserted that the Pennsylvania Supreme Court did not until 1999 "clarify" that the state filing deadline was jurisdictional and therefore non-waivable. But the statutory section containing the filing deadline is specifically labeled "Jurisdiction," 42 Pa.C.S.A. §9545. The state courts have been referring to the provision as jurisdictional since the first time bar cases reached them for review, even before respondent filed the state post-conviction petition at issue here. *Commonwealth v. Alcorn*, 703 Pa. Super. 1054 (Pa. Super. 1997) (courts lack jurisdiction to consider untimely PCRA petition); *see also Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638, 641 (1998) ("the General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment"). The prosecution, moreover, never offered to waive the time bar, but instead argued all along that respondent's petition was untimely.

[3] [District court]: Is it your view that you were equitably misled by the state of the law or equitably misled by the Pennsylvania Supreme Court, or equitably misled by this court?

[Counsel for respondent]: No.

significant, unavoidable risk that a post-conviction petition filed after the expiration of the state deadline would be dismissed. Respondent simply elected to accept that risk by proceeding in state court while letting the federal filing deadline wind down.

The court of appeals suggests that, had respondent filed a timely federal habeas petition while his untimely state petition was still in litigation, he would have risked dismissal of the federal petition on exhaustion grounds. But that was no risk at all. An exhaustion dismissal is a dismissal without prejudice, and it cannot subsequently be used against the petitioner. *See, e.g., Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997).

Yet – even after the trial judge dismissed his state petition as untimely in December 1997, and even though the one-year federal filing deadline would not expire until September 1998 – respondent did nothing, instead opting to "save" his federal filing until the last, pre-execution moment. He did not *have* to wait; he *chose* to wait. That delay may have been effective death penalty brinkmanship. But it was hardly beyond respondent's control.

And that has been the essential inquiry under the equitable tolling doctrine: not simply whether the circumstances were "extraordinary" or "grave" or some other standardless adjective, but whether they created a bar to filing *that was beyond the petitioner's control. See, e.g., Miller v. New Jersey State Department of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998) (equitable tolling proper where petitioner has been ""been prevented from asserting his or her rights' [citation omitted]"); *United States v. Marcello, supra*, 212 F.3d at 1010 ("circumstances far beyond the litigant's control must have prevented timely filing"). Without such a

showing, equitable tolling becomes merely a free pass around the inherent risks of litigation.

In order to insure that death would be different, moreover, the court of appeals was forced to distort equitable tolling principles in an additional manner as well. As mentioned above, the court identified various issues of Pennsylvania law that, it believed, created uncertainties as to the disposition of respondent's state post-conviction petition, and thus justified a belief when that petition was filed that it was properly filed.

The opinion below is definite, however, about the point at which the last of these uncertainties was resolved: with the Pennsylvania Supreme Court's decision in *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374 (1999). As of that point, in the analysis of the court of appeals, there was no longer any question about the mandatory, jurisdictional nature of the state time bar and its applicability to both capital and non-capital cases. App. 14.[4]

Even assuming that "uncertainty" up to that point would have warranted equitable tolling of the federal habeas filing deadline, there is a problem: *Banks* was decided on March 2, 1999; but respondent did not file his federal habeas petition until October 13, 1999 — a date, not coincidentally, less than one week before his scheduled execution.

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[4] *See Banks v. Horn*, 63 F. Supp. 525 (M.D. Pa. 1999) (Pennsylvania post-conviction time bar law uncertain until state supreme court's 1999 *Banks* decision); *see also Lines v. Larkin*, 208 F.3d 153, 164 (3d Cir. 2000) (state supreme court decision in *Banks* resolved prior doubt about scope and application of post-conviction time bar).

The law is clear that, if an impediment justifies equitable tolling of a filing deadline, the petitioner must then file promptly after the impediment is lifted. The Second Circuit has recently illustrated the principle:

> If a petitioner demonstrates that extraordinary circumstances did prevent him from filing on time and that he or she is therefore entitled to equitable tolling, how long should the limitations period be tolled? Although "equitable tolling does not lend itself to bright-line rules" [citation omitted], we conclude that if an act of confiscation such as that alleged by Valverde prevents a petitioner from filing before the ordinary limitations period expires, the tolling period must be sufficient to permit the filing of a petition ***on or before the earliest date*** after the act of confiscation ***by which that petitioner, acting with reasonable diligence, should have filed his or her petition***.

Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000) (emphasis supplied) (remanding to determine whether filing of federal habeas petition, 12 days beyond expiration of statute of limitations, was sufficiently prompt after cessation of impediment preventing earlier filing).

In this case, whether or not equity initially warranted suspension of the federal filing deadline for respondent, it surely did not license him to delay another seven months beyond resolution of the "uncertainty" on which he relies. Yet the Third Circuit offers no rationale whatsoever for tolling during this additional period. Death, after all, is different.

In the end, the Third Circuit's philosophy is troubling even on its own terms. If a death-sentenced defendant

received equitable tolling where the law would not otherwise allow it, could relief be successfully confined to capital cases? If, for example, a life-sentenced murderer escaped the death penalty simply because he didn't kill as many people, or didn't torture them, would he be denied entry to federal habeas court, while his more heinous cohort received that benefit on an identical procedural history? Would that be "equity?" The answers are already beginning to arrive: the opinion below has already been relied on to grant equitable tolling in a life sentence case, on the ground that state law concerning post-conviction timeliness was "uncertain." *See Pace v. Vaughn*, Order of June 8, 2001, Civil Action No. 99-6568 (E.D. Pa.).

Real equity suggests a different approach. It is true that this is a death case, that the stakes are the highest possible, demanding the greatest caution. But that admonition works in two directions. Respondent here also had some obligation to proceed cautiously; yet instead of filing a federal petition that on its face would have been timely, he elected to file only a state petition that on its face was untimely. In effect, what occurs in these circumstances is a game of legal "chicken." If, in a death case, the court must always flinch first, then the capital defendant can safely bet on delay. Unfortunately, the temptation for such delay in capital litigation was already too great. If death makes everything different, even filing deadlines, then that temptation will be irresistible.

CONCLUSION

For these reasons, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-9007

HENRY FAHY,

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; CONNER BLAINE, JR., SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Martin Horn;
Conner Blaine, Jr.;
Joseph P. Mazurkiewicz,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-5086)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY,

AMBRO, FUENTES, and STAPLETON,
Circuit Judges[1]

The petition for rehearing filed [by] the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard
United States Circuit Judge

DATE: 27 MAR 2001

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[1] Judge Stapleton's vote is limited to panel rehearing only.

App. 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-9007

HENRY FAHY,

vs.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; CONNER BLAINE, JR., SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Martin Horn;
Conner Blaine, Jr.;
Joseph P. Mazurkiewicz,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 99-cv-05086)
District Judge: The Honorable Norma L. Shapiro

ARGUED JULY 19, 2000

BEFORE: NYGAARD, McKEE, and STAPLETON,
Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on July 19, 2000.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the said District Court entered on November 22, 1999, be, and the same is hereby affirmed, albeit on equitable tolling grounds and not on statutory tolling grounds.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 9 February 2001

App. 5

Filed February 9, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-9007

HENRY FAHY,

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; CONNER BLAINE, JR., SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Martin Horn;
Conner Blaine, Jr.;
Joseph P. Mazurkiewicz, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 99-cv-05086)
District Judge: The Honorable Norma L. Shapiro

ARGUED JULY 19, 2000

BEFORE: NYGAARD, McKEE, and STAPLETON,
Circuit Judges.

(Filed: February 9, 2001)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

The appellants in this capital case are Martin Horn, the Commissioner of the Pennsylvania Department of Corrections, Conner Blaine, Jr., the Superintendent of the State Correctional Institution at Greene, and Joseph P. Mazurkiewicz, the Superintendent of the State Correctional

Institution at Rockview. We refer to these parties collectively as "the Commonwealth."

Appellee Henry Fahy was convicted of first degree murder in 1983 and sentenced to death. Fahy first appealed his conviction directly to the Pennsylvania Supreme Court, which affirmed the conviction and judgment of sentence. Fahy then filed a petition under Pennsylvania's Post Conviction Hearing Act, 42 Pa. Const. Stat. §9541 (superceded and replaced by the Post Conviction Relief Act ("PCRA") in 1988), but he did not pursue this petition and it was dismissed.

In 1992, the Governor of Pennsylvania issued Fahy's death warrant. Fahy obtained a stay of execution from the Pennsylvania Supreme Court, which remanded the case to the Philadelphia Court of Common Pleas to consider whether trial counsel had been ineffective. The Court of Common Pleas rejected Fahy's claim after an evidentiary hearing, and the Pennsylvania Supreme Court upheld this decision.

The Governor then signed another death warrant. Fahy again obtained a stay from the Pennsylvania Supreme Court and filed a third state petition for collateral review. In this petition, Fahy claimed that he suffered from mental illness, that there should have been a competency examination before the penalty phase, and that his illness should have been a mitigating factor in his sentencing.

At this time, Fahy also requested a stay and filed a habeas petition in the United States District Court of the Eastern District of Pennsylvania, which was dismissed without prejudice for failure to exhaust state remedies. The District Court entered this order because the Pennsylvania Supreme Court had already entered a stay of execution.

The state PCRA court again denied relief after a hearing. Fahy appealed to the Pennsylvania Supreme Court, but then requested that this appeal be withdrawn. Fahy, represented by counsel, stated that he wished to waive all remaining appeals and collateral proceedings so that he could be promptly executed. The Pennsylvania Supreme Court remanded to determine whether Fahy fully understood the consequences of his request. Fahy appeared before the PCRA court where he requested and was granted one additional week to consider his request. In addition, Fahy was transferred to a different correctional institution to avoid alleged harassment from a guard. Fahy later affirmed his desire to waive his appeal and any remaining collateral relief. The Pennsylvania Supreme Court upheld this waiver.

On November 12, 1997, Fahy's counsel filed a fourth petition for state collateral relief. The PCRA court dismissed this petition because of its failure to set forth a prima facie case that a miscarriage of justice had occurred and because it was time-barred. The Pennsylvania Supreme Court affirmed, noting that the petition was untimely and that the court lacked jurisdiction to review it.

The Governor then issued another warrant of execution for Fahy, scheduling his execution for October 19, 1999. On October 13, 1999, Fahy's counsel filed a motion for stay of execution and an amended habeas petition in the District Court. On October 14, 1999, the District Court stayed the execution for a period of 120 days. The District Court further determined that the amended petition should be treated as a first, and not a successive, habeas petition because the first application was dismissed without prejudice.

The Commonwealth argued that the amended habeas petition was untimely, but the District Court concluded that it

was not time barred because both statutory and equitable tolling applied. Chief Judge Giles[1] stated that his decision would be subject to modification by Judge Shapiro, who would consider the matter within thirty-five days from the date of his order. Judge Shapiro extended the stay to allow the parties to brief the substantive issues of the petition. After considering the matter, Judge Shapiro agreed that Fahy's amended habeas petition was properly filed. The Commonwealth appeals this determination. We will affirm.

I. Statutory Tolling

Three provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are relevant to Fahy's habeas petition. First, the AEDPA sets a statute of limitations period of one year to apply for a writ of habeas corpus challenging state court action. *See* 28 U.S.C. §2244(d)(1); *Morris v. Horn,* 187 F.3d 333, 337 (3d Cir. 1999). This period begins running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* However, the statute of limitations may be statutorily tolled during "[t]he time during which a *properly filed* application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* (emphasis added). Second, §2254 requires petitioners to exhaust their state court remedies "unless there is an absence of available corrective state process or state remedies are ineffective." *Morris,* 187 F.3d at 337; *see also Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198 (1982); 28 U.S.C. §2254(b)(1). Third,

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[1] Under the Eastern District's procedures this matter would have been assigned to Judge Shapiro because she reviewed the initial habeas petition, but the case was assigned to Chief Judge Giles because Judge Shapiro was unavailable at that time.

the AEDPA "severely limits the extent to which a federal habeas petitioner can file a 'second or successive' habeas petition." *Morris,* 187 F.3d at 338; *see also* 28 U.S.C. §2244(b). The AEDPA statute of limitations can only be statutorily tolled when a collateral petition for state relief was "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Morris,* 187 F.3d at 338 (quoting *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998)). Thus, in the AEDPA Congress set forth the requirement that only a *properly filed* petition for state collateral relief can toll the statute of limitations for filing a federal habeas petition, and in *Lovasz,* 134 F.3d at 146, we defined "properly filed" as being submitted in accordance with the state's procedural requirements. State petitioners therefore must file their state claims promptly and properly under state law in order to preserve their right to litigate constitutional claims that are more than one year old in federal court. As the Ninth Circuit has stated, "[h]ad Congress intended to toll the statute of limitations for the period during which even improper applications were pending in state court, it would not have included the 'properly filed' limitation." *Dictado v. Ducharme,* 189 F.3d 889, 892 (9th Cir. 1999).

Fahy argues that we must decide whether his state PCRA petition was "properly filed" as a matter of federal law and that the state court's determination of this issue is not binding on us. Fahy is correct that in applying a federal statute we must construe its terms as a matter of federal law. However, the AEDPA explicitly directs us to toll the statute of limitations only when a collateral petition for state relief was "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Morris,* 187 F.3d at 338. Therefore, to apply this statute as a matter of federal law we must look to state law

governing when a petition for collateral relief is properly filed. The AEDPA requires us to interpret state law as we do when sitting in diversity cases, and we therefore must defer to a state's highest court when it rules on an issue. Here the Pennsylvania Supreme Court has specifically ruled that Fahy's PCRA petition was not properly filed as a matter of state law. As a result, because final judgment in Fahy's case occurred on October 21, 1986, before the new habeas statute became effective on April 24, 1996, Fahy had one year from the statute's effective date to file his habeas petition. *See Burns v. Morton,* 134 F.3d 109, 111 (3d Cir. 1998). The one year filing deadline thus expired well before Fahy filed his habeas petition in 1999. Fahy's petition was therefore not statutorily tolled because his PCRA petition was not properly filed.

II. Equitable Tolling

Fahy delayed filing his federal habeas petition because he believed he was required to pursue a fourth petition for collateral relief in state court. At the time Fahy made this ill-advised choice, he reasonably believed that the state petition was properly filed. The Pennsylvania Supreme Court eventually disagreed, but the filing period for Fahy's federal habeas petition had run by the time the Court ruled. Fahy claims, and the District Court ruled, that the statute of limitations for filing his habeas petition should have been tolled to allow him to determine if he could maintain his state petition.

We have explained that the one year filing deadline contained in 28 U.S.C. §2244(d)(1) can be subject to equitable tolling

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.

Miller v. New Jersey Dept. of Corr., 145 F.3d 616, 618 (3d Cir. 1998). We later enumerated three circumstances permitting equitable tolling:

> if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted).

In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the "extraordinary" circumstances required for equitable tolling. *See Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000) (finding no basis for equitable tolling where the statute of limitations was changed to shorten the time for filing a PCRA only four months prior to the filing of the petition); *Taliani v. Chrans*, 189 F.3d 597 (9th Cir. 1999) (finding lawyer's inadequate research, which led to miscalculating the deadline, did not warrant equitable tolling); *Seitzinger v. Reading Hosp. and Medical Ctr.*, 165 F.3d 236 (3d Cir. 1997) (finding that an attorney's deception, which caused a prisoner to miss the habeas filing deadline, merits equitable

tolling); *Doherty v. Teamsters Pension Trust Fund of Phila. & Vicinity,* 16 F.3d 1386 (3d Cir. 1994) (allowing time to toll because of the death of the petitioner's attorney). As the Supreme Court has repeatedly stated, however, "death is different." *See Caldwell v. Mississippi,* 472 U.S. 320, 329, 105 S.Ct. 2633, 2639 (1985) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Gardner v. Florida,* 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.... It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of "equity would make the rigid application of a limitation period unfair" and whether the petitioner has "exercised reasonable diligence in investigating and bringing [the] claims." *Miller,* 145 F.3d at 618.

If the limitation period is not tolled in this case, Fahy will be denied all federal review of his claims. Here the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions Fahy attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than "extraordinary" circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair. The subsequent question, therefore, is whether Fahy diligently and reasonably asserted his claims.

First, at the time Fahy filed his fourth PCRA petition Pennsylvania law was unclear on the operation of the new PCRA time limit. The Pennsylvania courts could have accepted Fahy's petition as timely because of its role within the capital case, *see Banks v. Horn,* 126 F.3d 206 (3d Cir. 1997), or could have found the government interference exception applicable. *See Commonwealth v. Lark,* 560 Pa. 487, 476 A.2d 585 (2000). The law at the time of Fahy's petition was inhibitively opaque. Fahy filed his fourth PCRA petition in November, 1997, months before the Pennsylvania Supreme Court announced that it would no longer observe the relaxed waiver rule in *Commonwealth v. Albrecht,* 554 Pa. 31, 720 A.2d 693 (1998). Further, the Pennsylvania Supreme Court did not clarify that the state PCRA statute was jurisdictional and not waivable until 1999 in *Commonwealth v. Banks,* 556 Pa. 1, 726 A.2d 374 (1999). In *Banks,* 126 F.3d at 214, we rejected the Commonwealth's claim that a PCRA petition would be time-barred and required Banks to return to state court because we could not confidently determine that the state court would not apply the relaxed waiver rule it had applied in previous capital cases. If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner. Fahy's misjudgment, therefore, was reasonable.

Second, it was also objectively reasonable for Fahy to believe that if he filed a §2254 petition at the time he filed his fourth PCRA petition, the §2254 petition would be dismissed as unexhausted. As we stated in *Banks,* at the relevant time we could not, "with confidence," predict the Pennsylvania court's position regarding procedural bars on unexhausted claims. *Banks,* 126 F.3d at 214. In light of this uncertainty, the changes wrought by the AEDPA, and our strong opinions regarding exhaustion, it was reasonable for Fahy to believe that a fourth petition was necessary.

If we refuse to equitably toll the statute, then we would deny this capital defendant federal review of his claims. Fahy diligently asserted his claims and the strategic choices he made during the appeal process were reasonable. When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a §2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court. We will therefore equitably toll the AEDPA's statute of limitations. We elect to exercise this leniency under the facts of this capital case[] where there is no evidence of abuse of the process.

We therefore affirm the order of the District Court, albeit on equitable tolling grounds and not on statutory tolling grounds.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY FAHY	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, JOSEPH PRICE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTE AT GREEN, JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTE AT ROCKVIEW	:	NO. 97-2846

ORDER

ENTERED: 10-14-99
CLERK OF COURT

AND NOW, this 14th day of October, for the reasons stated of record at the close of argument on October 13, 1999, it is hereby ORDERED that the requested Stay of Execution is GRANTED for a period of One Hundred Twenty (120) days. The Stay is subject to modification by the Assigned Judge (Shapiro, J.) who will reconsider and rule upon the parties' legal positions on timeliness of the filing of the federal habeas corpus petition not earlier than twenty (20) days from today and not later than thirty-five (35) days from today.

FURTHER, it is hereby ORDERED that the Commonwealth Defendants shall file a Memorandum as to all timeliness issues within fifteen (15) days from the date of this Order.

FURTHER, it is hereby ORDERED that Petitioner shall file and serve upon Commonwealth counsel, within thirty (30) days from the date of this Order, a Memorandum in support of all substantive bases advanced for habeas corpus relief. The Commonwealth Defendants shall not be obligated to file a written response to the said Memorandum unless or until the Assigned Judge rules on the timeliness issue following consideration of the Commonwealth Defendants' Memorandum, which will have addressed that issue. Should the Assigned Judge agree with this court that the habeas corpus petition is timely filed, the Commonwealth shall file its Memorandum response to the substantive issue Memorandum of Fahy within thirty (30) days of the date of the Assigned Judge's Order on the timeliness issue.

Further, it is hereby ORDERED that Billy Nolas, Kathy Swedlow, and the Defender's Association of Philadelphia are appointed to represent Fahy.

Movant Henry Fahy ("Fahy") is a Pennsylvania prisoner scheduled for execution by lethal injection on October 19, 1999. Pending before the court is Fahy's Application for Stay of Execution.

On Wednesday, October 13, 1999, this court held an emergency oral argument on the Application for Stay. As Emergency Judge, this court makes the following findings in support of the Stay of Execution.

1. Petitioner previously filed a petition for habeas corpus relief in this Court. That petition was dismissed without prejudice in order for Petitioner to exhaust state court remedies.

2. Petitioner pursued post-conviction proceedings in the Pennsylvania state courts, which resulted in relief not being granted.

3. Petitioner has now filed an amended petition for writ of habeas corpus and an application for stay of execution in this Court.

4. This amended petition is to be treated as a first, not second, petition for habeas corpus relief since the prior petition was dismissed without prejudice.

5. Mr. Fahy wishes to litigate his case and to have his claims for relief heard, as reflected by the number of affidavits he has filed so indicating.

6. Petitioner's submissions meet the requirements of federal law for the granting of a stay of execution.

A.

Since Fahy is indigent, federal statute grants him a right to appointment of counsel in any federal habeas corpus proceeding seeking to set aside a death sentence. 21 U.S.C. §848(q)(4)(B). The Supreme Court recently held that this right to appointment of counsel "necessarily includes a right for counsel to meaningfully research and present the defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994). Further, it would "clearly be improper" for a court to allow an execution without giving the habeas

petitioner adequate time to do research and present his habeas claims. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)). Hence, this court orders a stay of execution for One Hundred Twenty (120) days to allow Fahy's counsel to research and present all of Fahy's habeas claims.

B.

Petitioner chailenges his imprisonment based on several federal constitutional grounds. Since Fahy is slated to be executed in less than one week, this court must grant the stay of execution to enable him to "research and present" his habeas claims. *See McFarland*, 512 U.S. at 858.

Although it is clear that the Supreme Court did not intend every habeas petitioner with a nearing execution date to be granted a stay of execution, *see id.* (noting that the Court does not grant "capital defendants an automatic stay of execution"), this court finds the present case does not contain any of the traditional grounds for denying a stay.

7. More specifically this court finds that Fahy's state court post-conviction proceedings were "properly filed" as a matter of federal law.

This court would not grant a stay of execution if it was clear that Fahy's habeas petition was time-barred under federal law. *See Cantu-Tzin v. Johnson*, 162 F.3d 295, 296 (5th Cir. 1998) (noting that there was no need to stay an execution "for the wholly futile enterprise of addressing the merits of a time-barred habeas petition"). However, this court finds that Fahy's habeas claim is not time-barred.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year period of limitation

for applications for writs of habeas corpus for a person in custody pursuant to a state court judgment. *See* 28 U.S.C. §2244(d)(1). This one year period runs from the latest of four dates, delineated in §2244(d)(1)(A)-(D). Petitioners like Fahy -- whose convictions became final prior to April 24, 1996 -- typically have one year after the AEDPA effective date to file a federal habeas petition. *See Gray v. Sobina*, No. 97-CIV-4978, 1998 WL 167279, at *2 (E.D. Pa. 1998) (citing *Burns v. Morton*, 134 F.3d 109, 112-13 (3d Cir. 1998)). Therefore, under §2244(d)(1), Fahy had until April 24, 1997 to file a federal habeas corpus petition pursuant to 28 U.S.C. §2254.

Although Fahy did not file his petition by the above date, his habeas petition is not time-barred because of the doctrines of statutory tolling and equitable tolling.

A. Statutory Tolling

This court finds that Fahy was pursuing appropriate state collateral relief until just before his federal habeas petition was filed. Habeas petitions filed more than one year after AEDPA's effective date are not time-barred if the petitioner was pursuing appropriate state collateral relief until up to one year before he filed his habeas petition. *See Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998). Section 2244 provides that: "[t]he time during which a *properly filed application* for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2) (emphasis added).

The Commonwealth claims that Fahy's most recent petition for state post-conviction relief (hereafter, his "fourth

petition") was untimely, thus prohibiting Fahy from taking advantage of an extended habeas filing period. By November 17, 1995, the General Assembly of Pennsylvania had amended the Post Conviction Relief Act ("PCRA") to require that any PCRA petition, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." 42 Pa.C.S. §9545(b)(2). Since Fahy's fourth petition (which was filed November 12, 1997) did not comply with this time limit, the Commonwealth argues he was not entitled to extended time for filing a federal habeas petition while his fourth PCRA petition was pending. Based on this provision, a Pennsylvania trial court and the Pennsylvania Supreme Court concluded that the fourth petition was untimely. Indeed, the Commonwealth is correct ["]that a [']properly filed application['] is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Lovasz*, 134 F.3d at 148.

However, this court finds that Fahy's fourth PCRA petition was properly filed because it fit into an exception to the PCRA amendment. The amended PCRA exempts petitioners from the one year PCRA limitation when:

> (I) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States.

42 Pa.C.S. §9545(b)(1)-(2). This exception applies as long as the petition invoking the exception is "filed within 60 days of the date the claim could have been presented." *Id.*

Fahy's fourth petition claimed interference of government officials and was filed within sixty (60) days of when

his claim could have been presented. Fahy initially attempted to waive his rights to further appeal and to reject any further representation from his then-counsel. The Supreme Court of Pennsylvania ordered a colloquy in state court to determine if Fahy had competently waived his rights. Fahy was allegedly threatened by prison guards at the time he waived his rights and at the subsequent state court colloquy that determined his knowing waiver. The colloquy ended on August 9, 1996. On August 21, 1996, Fahy wrote a letter to the Pennsylvania Supreme Court explaining that he had been coerced and that he did not mean to waive his rights. The Pennsylvania Supreme Court eventually refused to recognize the statement as outside the record and upheld the trial court's finding of waiver of rights, prompting Fahy to file the fourth PCRA petition. Fahy's letter, sent less than two weeks after the alleged coercion must be construed as satisfying the petition requirement. It was in writing and it informed the courts responsible to adjudicate the waiver issue of the new evidence. The "petition" was filed within sixty days. To find otherwise would elevate form above substance and defy reason and the notice objective of the statute. Fahy began the process of petitioning the "interference by government officials" by pointing out to a higher court the failing of a lower court proceeding over which the higher court had jurisdiction.

More importantly, Fahy filed his fourth PCRA petition within sixty days after the Pennsylvania Supreme Court held that Fahy had properly waived his rights to appeal. Only upon the issuance of this decision did Fahy know that the Pennsylvania Supreme Court would ignore the claim that coercion from guards caused his rights to be waived. Since his fourth PCRA petition was filed within sixty days of the Pennsylvania Supreme Court's decision, it was timely under the PCRA. Thus, his federal habeas petition was timely since

it was filed as soon as Fahy finished pursuing proper state law collateral relief.

B. Equitable Tolling

Fahy also filed a habeas petition in a timely manner under the doctrine of "equitable tolling." *See Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616 (3d Cir. 1998). The *Miller* Court held that petitioners are not time-barred if "principles of equity would make the rigid application of a limitations period unfair" and the petitioner "exercised reasonable diligence in investigating and bringing the claims." *Miller*, 145 F.3d at 618-19 (citations omitted). This court finds that both these conditions have been met in Fahy's federal habeas petition.

Based on the discussion of statutory tolling above, the court finds petitioner diligently complied with relevant time limits. If a federal district court could conclude that the fourth PCRA petition was proper, it would be unfair and overly burdensome to expect more from Fahy.

Moreover, the petitioner came to federal court in an attempt to raise a habeas petition in 1997. Judge Norma Shapiro dismissed the petition, stating that Fahy had to exhaust his state remedies. At this prompting, Fahy continued to pursue state collateral relief. It would be unfair and over-demanding to have Fahy lose his right to a federal habeas petition because he followed the instructions of a federal court.

It also would be unfair for Fahy to lose his right to a federal habeas petition based on an untimely fourth PCRA petition because at the time he filed the petition, state and federal law suggested that the PCRA petition would not be

time-barred. *See Banks v. Horn*, 126 F.3d 206, 214 (3d Cir. 1997) (stating that the court was "not confident" that the most recent PCRA amendments would change the Pennsylvania Supreme Court's "practice of reaching the merits of claims in PCRA petitions in capital cases regardless of the failure of the petition to meet the appropriate procedural criteria"). Even with the exercise of due diligence, there was no way for Fahy to know that his fourth PCRA petition would be found time-barred by the Pennsylvania Supreme Court. It would be unfair to deny him federal habeas relief because of such an unforeseeable outcome.

Further, it seemed reasonable for Fahy to expect that the Pennsylvania Supreme Court would properly examine all circumstances pertaining to the colloquy and waiver to determine if the colloquy was sufficient in and of itself to decide the constitutional validity of the waiver. That Court had ordered the trial court colloquy to determine if Fahy competently waived his rights.

For all the foregoing reasons, it would be fundamentally unfair to preclude Fahy from pursuing his federal habeas petition after attempting to exhaust state remedies on all issues. Hence, his petition is not time-barred under principles of equitable tolling.

8. Fahy's petition is also not barred by *McFarland*. This court would not grant a stay if Fahy was purposely ignoring deadlines in hopes of garnering a stay of execution (pursuant to a frivolous habeas petition) just before he was scheduled to be put to death. The Supreme Court in *McFarland* commented that a court would abuse its discretion if it allowed a stay of execution when a "dilatory capital defendant inexcusably ignores [earlier opportunities to file a habeas petition] and flouts the available processes."

McFarland, 512 U.S. at 858. No reliable evidence has been presented to date by the Commonwealth to support a conclusion that Fahy "inexcusably ignored" or intentionally "flouted" available processes.

BY THE COURT:

/s/
EMERGENCY JUDGE
JAMES T. GILES, C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY FAHY	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, JOSEPH PRICE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTE AT GREENE, JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTE AT ROCKVIEW	:	NO. 97-2846

ORDER

ENTERED: 10-14-99
CLERK OF COURT

AND NOW, this 14th day of October 1999, it hereby is ORDERED that the Clerk of Court shall assign this matter a new civil action number for all future filings.

BY THE COURT:

/s/
GILES, JAMES T., C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY FAHY	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; CONNER BLAINE, JR., Superintendent of the State Correctional Institution at Greene; and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview	:	NO. 99-5086

ORDER

AND NOW, this 18th day of November, 1999, after a hearing in open court at which counsel for both sides were heard, and at which petitioner was present via video teleconference, it appearing that the parties have neither cited recent cases nor raised new arguments that impel this court to modify Chief Judge Giles's October 14, 1999 decision that petitioner's habeas corpus petition was timely filed, and that a stay of execution was appropriate,

it is **ORDERED** that:

1. Chief Judge Giles's order of October 14, 1999 is **MODIFIED** as follows:

    a. Petitioner shall file and serve upon Commonwealth counsel a memorandum in support of all substantive bases

advanced for habeas corpus relief on or before ***December 3, 1999***.

b. The Commonwealth defendants shall file a written response to petitioner's memorandum on or before ***January 10, 2000***.

c. Petitioner may file a short reply brief on or before ***January 25, 2000***.

2. A hearing will be held concerning the validity of petitioner's waiver and his substantive claims in support of a writ of habeas corpus on ***February 7, 2000 at 9:30 a.m.***

3. The stay of execution entered by Chief Judge Giles on October 14, 1999 is ***AFFIRMED*** and ***EXTENDED*** through ***March 17, 2000*** to allow counsel and the court sufficient time to act on the substantive issues raised in the petition.

/s/ Norma L. Shapiro
S.J.

Supreme Court, U.S.
FILED
JUL 24 2001
CLERK

NO. 01-17

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pa. Dept. of Corrections; CONNER BLAINE, JR., Supt. of the State Correctional Institution at Greene; and JOSEPH P. MAZURKIEWICZ, Supt. of the State Correctional Institution at Rockview,
Petitioners

v.

HENRY FAHY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

SUPPLEMENTAL APPENDIX

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Deputy District Attorney
(*Counsel of Record*)
JOHN W. GOLDSBOROUGH
Assistant District Attorney
THOMAS W. DOLGENOS
Chief, Federal Litigation
ARNOLD H. GORDON
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY FAHY	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; CONNER BLAINE, JR., Superintendent of the State Correctional Institution at Greene; and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview	:	NO. 99-5086

ORDER

ENTERED: 11-22-99
CLERK OF COURT

AND NOW, this 18th day of November, 1999, after a hearing in open court at which counsel for both sides were heard, and at which petitioner was present via video teleconference, it appearing that the parties have neither cited recent cases nor raised new arguments that impel this court to modify Chief Judge Giles's October 14, 1999 decision that petitioner's habeas corpus petition was timely filed, and that a stay of execution was appropriate,

it is **ORDERED** that:

1. Chief Judge Giles's order of October 14, 1999 is **MODIFIED** as follows:

a. Petitioner shall file and serve upon Commonwealth counsel a memorandum in support of all substantive bases advanced for habeas corpus relief on or before ***December 3, 1999***.

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c. Petitioner may file a short reply brief on or before ***January 25, 2000***.

2. A hearing will be held concerning the validity of petitioner's waiver and his substantive claims in support of a writ of habeas corpus on ***February 7, 2000 at 9:30 a.m.***

3. The stay of execution entered by Chief Judge Giles on October 14, 1999 is ***AFFIRMED*** and ***EXTENDED*** through ***March 17, 2000*** to allow counsel and the court sufficient time to act on the substantive issues raised in the petition.

/s/ Norma L. Shapiro
S.J.